

## **Aspects from European Court of Justice case-law on equal treatment as regards dismissal**

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### ***Abstract***

*Equal treatment between women and men is a fundamental right, a general principle of EU law. In European Court of Justice case-law and in European law were treated different aspects of discrimination on grounds of sex. Principle of equal treatment between women and men applies to remuneration, access to employment, vocational training and promotion, and working conditions, but it is equally applied to dismissal. Among the issues covered by European law on equal treatment between women and men, in this article I will examine only the European Court of Justice case-law on dismissal.*

**Keywords:** *Dismissal, non-discrimination, equal opportunities, European law, labour law.*

**JEL Classification:** K41, K42

### **1. The concept of dismissal**

Article 23 of Charter of fundamental rights of the European Union states that equality between men and women must be ensured in all areas. So, equality between men and women is a fundamental human right in European Union.

One of the duties of Court of Justice of the European Union is to ensure respect for human rights<sup>2</sup>.

Article 5 para.1 of Directive 76/207 provides for the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex. The scope of Directive 2000/78 contains, inter alia, the conditions for dismissal<sup>3</sup>.

As regards the scope of the principle of equal treatment between men and women the Court held that it has general application and shall also apply to the public sector<sup>4</sup>.

No less, the principle of equal treatment between men and women should be applied to the EU institutions workers<sup>5</sup>.

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<sup>2</sup> Judgment of 15 June 1978, Defrenne / Sabena (149/77, ECR 1978 p. 1365), Judgment of 20 March 1984, Razzouk and others / Commission (75 and 117/82, ECR 1984 p. 1509).

<sup>3</sup> Art. 3 (1) (c) of Directive 2000/78.

<sup>4</sup> Judgment of 26 October 1999, Sirdar (C-273/97, ECR 1999 p. I-7403), Judgment of 11 January 2000, Kreil (C-285/98, ECR 2000 p. I-69), Judgment of 19 March 2002, Lommers (C-476/99, ECR 2002 p. I-2891).

<sup>5</sup> Judgment of 20 March 1984, Razzouk and others / Commission (75 and 117/82, ECR 1984 p. 1509).

By corroborating the Article 3 of Directive 2000/78 with CJEU case-law results that the principle of equal treatment between men and women, in labour relations, apply both in the public and private sectors, including public bodies and EU institutions.

The concept of dismissal is not defined in European legislation on equal treatment between men and women.

In *Burton* case<sup>6</sup>, the Court held that the concept of 'dismissal' that appear in the Directive must be widely construed so as to include termination of the employment relationship between a worker and his employer, even as part of a voluntary redundancy scheme. In this case was also considered dismissal the situation where the employment relationship has ended due to the existence of a voluntary collective redundancy plan, and *Palacios de la Villa* case<sup>7</sup> was considered to fall within the concept of dismissal the forced retirement.

In *Marshall*<sup>8</sup> case the Court ruled that a general policy of termination of employment whereby a woman's employment is terminated solely because she has attained or passed the qualifying age for a State pension, that age being different under national legislation for men and for women, constitutes discrimination on grounds of sex.<sup>9</sup> Consequently, the age limit for compulsory termination of employment in a general retirement policies applied by an employer, even if the termination of the activity involves a pension, falls within the concept of 'dismissal'.<sup>10</sup>

## 2. Dismissal notification

In judgement of 11 October 2007 the Court was asked to interpret article 5, para. 1 of Directive 76/2007. The reference was made in proceedings between Mrs Paquay, in proceedings between Mrs Paquay, the applicant, on one hand and the Société d'architectes Hoet + Minne SPRL, defendant, on the other hand, concerning the dismissal of the applicant.

In this case, Ms. Paquay, an employee with the defendant firm of architects since 24 December 1987, was on maternity leave from the month of September until the end of the month of December 1995. Her maternity leave ended on 31 December 1995 and the period of protection against dismissal, running from the beginning of the pregnancy until the end of the maternity leave, ended, in accordance with Belgian law, on 31 January 1996. The applicant was dismissed by registered letter dated 21 February 1996, at a time when the period of protection had ended, giving a notice period of six months running from 1 March 1996. The

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<sup>6</sup> Judgment of 16 February 1982, *Burton / British Railways Board* (19/81, ECR 1982 p. 554).

<sup>7</sup> Judgment of 16 October 2007, *Palacios de la Villa* (C-411/05, ECR 2007 p. I-8531).

<sup>8</sup> Judgment of 26 February 1986, *Marshall / Southampton and South-West Hampshire Area Health Authority* (152/84, ECR 1986 p. 723).

<sup>9</sup> Judgment of 26 February 1986, *Marshall / Southampton and South-West Hampshire Area Health Authority* (152/84, ECR 1986 p. 723), Judgment of 18 November 2010, *Kleist* (C-356/09, ECR 2010 p. I-11939).

<sup>10</sup> *Idem* 7.

defendant ended the contract on 15 April 1996, making a compensatory payment for the balance of the notice period. The referring court notes that the decision to dismiss the applicant was taken while she was pregnant and before 31 January 1996, namely before the end of the period of protection against dismissal, and that decision had been formed in a number of stages. It is clear from the request for a preliminary ruling that, during the pregnancy, the defendant had placed in a newspaper, on 27 May 1995, a notice for the recruitment of a secretary and had indicated to a candidate, on 6 June 1995, that 'the post is available from mid-September 1995 until January 1996' which corresponded to the expected period of maternity leave, 'and then from August 1996', or from the expiry of the 6-month notice period notified in the usual way after the protection period. It is not disputed that, at the date of 27 May 1995, the company was aware of the pregnancy and that the notice concerned the post occupied by the applicant. The request for a preliminary ruling shows that in that the defendant placed a second notice in October 1995 that is shortly after the beginning of the maternity leave, which confirms the firm's intention to provide for the permanent replacement of the applicant and that the decision was, in that way, taken while the applicant was pregnant.

By its first question, the referring court asks, in essence, whether EU legislation should be interpreted as prohibiting not only the notification of a decision to dismiss on the ground of pregnancy and/or the birth of a child during the period of protection provided for in paragraph 1 of that article but also the taking of such a decision to dismiss and preparing the permanent replacement of such a worker before the expiry of that period.

The Court ruled that the prohibition on the dismissal of pregnant women and women who have recently given birth or are breastfeeding during the period of protection is not limited to the notification of that decision to dismiss. The protection granted by that provision to those workers excludes both the taking of a decision to dismiss as well as the steps of preparing for the dismissal, such as searching for and finding a permanent replacement for the relevant employee on the grounds of the pregnancy and/or the birth of a child. Furthermore, an employer who decides to replace a pregnant worker or a worker who has recently given birth or is breastfeeding, on the grounds of her condition, and who, from the moment when he first had knowledge of the pregnancy, takes concrete steps with a view to finding a replacement, is pursuing the objective which is specifically prohibited by Directive 92/85, that is to dismiss a worker on the grounds of her pregnancy and/or the birth of a child. A contrary interpretation, restricting the prohibition to only the notification of the decision to dismiss during the period of protection set down in Article 10 of Directive 92/85, would deprive that article of its effectiveness and could give rise to a risk that employers will circumvent the prohibition to the detriment of the rights of pregnant women and women who have recently given birth or are breastfeeding<sup>11</sup>.

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<sup>11</sup> Judgment of 11 October 2007, Paquay (C-460/06, ECR 2007 p. I-8511).

The Court sets that a decision to dismiss on the grounds of pregnancy and/or the birth of a child is contrary to EU Directive, irrespective of the moment when that decision to dismiss is notified and even if it is notified after the expiry of the period of protection<sup>12</sup>.

From the Court's replies results that the notification of a dismissal decision, taken by reason of the pregnancy and/or the birth of a child, to a worker during the period of protection and the taking of such a decision during that period of protection, even in the absence of notification, and the preparation of a permanent replacement of that female worker on the same grounds, are contrary to EU Directives.

### 3. Reaching pensionable age

Miss M. H. Marshall was employed by the Southampton and South-West Hampshire Area Health Authority (Teaching) from June 1966 to 31 March 1980. On 31 March 1980, that is to say approximately four weeks after she had attained the age of 62, was dismissed, notwithstanding that she had expressed her willingness to continue in the employment until she reached the age of 65. The sole reason for the dismissal was the fact that the appellant was a woman who had passed ' the retirement age' applied by the respondent to women.

The referring court asks whether the respondent's dismissal of the appellant after she had passed her 60th birthday pursuant to the policy ( followed by the respondent ) and on the grounds only that she was a woman who had passed the normal retiring age applicable to women was an act of discrimination prohibited by the equal treatment directive .

The Court observes in the first place that the question of interpretation which has been referred to it does not concern access to a statutory or occupational retirement scheme, that is to say the conditions for payment of an old-age or retirement pension, but the fixing of an age limit with regard to the termination of employment pursuant to a general policy concerning dismissal. The question therefore relates to the conditions governing dismissal and falls to be considered under Directive no 76/207<sup>13</sup>.

In the Court interpretation, article 5 ( 1 ) of Directive no 76/207 means that a general policy concerning dismissal involving the dismissal of a woman solely because she has attained the qualifying age for a state pension, which age is different under national legislation for men and for women, constitutes discrimination on grounds of sex, contrary to that Directive<sup>14</sup>.

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<sup>12</sup> *Idem*.

<sup>13</sup> Judgment of 26 February 1986, Marshall / Southampton and South-West Hampshire Area Health Authority (152/84, ECR 1986 p. 723).

<sup>14</sup> Judgment of 26 February 1986, Marshall / Southampton and South-West Hampshire Area Health Authority (152/84, ECR 1986 p. 723).

#### 4. Parental leave

In *Nadežda Riežniece v Zemkopības ministrija and Lauku atbalsta dienests* judgement<sup>15</sup> the Court should determine if the EU Directives should be interpreted as meaning that an employer is precluded from undertaking any action (in particular, the assessment of an employee while absent) which might result in a female employee on parental leave losing her post after returning to work.

In 14 November 2005, Ms Riežniece was appointed to the post of principal adviser in the Legal Affairs Division of the Administrative Department.

In 2006, Ms Riežniece was given an annual performance appraisal in her capacity as a public official, with a view to assessing the quality of her work and improving and promoting her professional development. The appraisal questionnaire comprised five criteria, each of which was made up of a number of sub-criteria. An overall mark was given at the end of the appraisal.

Ms Riežniece took parental leave from 14 November 2007 to 6 May 2009.

In 2009, as part of a structural reorganisation of the Lauku atbalsta dienests, a post of principal adviser in the Legal Affairs Division of the Administrative Department was abolished, although the post to be abolished made no reference to any particular official.

In order to determine which official would be affected by the abolishment of that post, the performance and qualifications of four officials, including Ms Riežniece, were assessed using identical criteria and the same scale of assessment.

Two of the officials assessed in 2009, a man and a woman who had remained working, were assessed for the period from 1 February 2008 to 26 February 2009. Ms Riežniece and another worker, who had also taken parental leave, were assessed on the basis of the last annual performance appraisal conducted before they took parental leave. Ms Riežniece, who obtained a lower overall mark than what she had been given in her 2006 performance appraisal, was ranked last. The other female worker who had taken parental leave obtained the highest mark, which was the same as the female worker who had remained in active service.

Consequently, on 7 May 2009 the Lauku atbalsta dienests notified Ms Riežniece that her employment was being terminated on the ground that the post which she occupied was being abolished, whilst at the same time offering her another post as a principal adviser in the Development of Information Systems Unit in the Information Department. Ms Riežniece accepted the transfer to that other post immediately.

On 18 May 2009, due to national economic difficulties, new measures requiring structural changes in the Lauku atbalsta dienests were adopted. On 26 May 2009, the Lauku atbalsta dienests notified Ms Riežniece that her employment was being abolished. Ms Riežniece's employment as a public official was, consequently, terminated.

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<sup>15</sup> Judgment of 20 June 2013, *Riežniece* (C-7/12).

The Framework Agreement on Parental Leave enables new parents to take a break from work to devote themselves to their family responsibilities, whilst giving them the assurance, set out in clause 2.5 of that agreement that they will be entitled to return to the same job at the end of the leave. During a period freely set by each Member State subject to a minimum duration of three months, and in accordance with detailed rules left to national legislatures to determine, the new parents are thus able to provide their child with the assistance that his or her age requires and to make provision for measures organising family life with a view to their return to work<sup>16</sup>.

The Court held that the Framework Agreement on Parental Leave does not preclude a situation where an employer, in the context of the abolishment of a post, proceeds with the assessment of a worker who has taken parental leave with a view to transferring that worker to an equivalent or similar post consistent with that worker's employment contract or relationship. This also holds true where the employer intends to reduce the number of workers in all of the State administrative departments due to national economic difficulties. An employer is allowed to reorganise its departments in order to ensure efficient management of its organisation, subject to compliance with the applicable rules of European Union law<sup>17</sup>. In order not to place workers who have taken parental leave at such a disadvantage, the assessment must comply with a certain number of requirements. In particular, it must encompass all workers liable to be affected by the abolishment of the post. Such an assessment must also be based on criteria which are absolutely identical to those which apply to workers in active service. Moreover, the implementation of those criteria must not involve the physical presence of the workers, a condition which a worker on parental leave is unable to fulfil<sup>18</sup>.

In C7/12<sup>19</sup> the Court ruled that Directive 76/207 and the Framework Agreement on Parental Leave must be interpreted as precluding:

– a situation where, as part of an assessment of workers in the context of abolishment of officials' posts due to national economic difficulties, a worker who has taken parental leave is assessed in his or her absence on the basis of assessment principles and criteria which place him or her in a less favourable position as compared to workers who did not take parental leave; in order to ascertain whether or not that is the case, the national court must *inter alia* ensure that the assessment encompasses all workers liable to be concerned by the abolishment of the post, that it is based on criteria which are absolutely identical to those applying to workers in active service and that the implementation of those criteria does not involve the physical presence of workers on parental leave; and

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<sup>16</sup> Judgment of 16 September 2010, Chatzi (C-149/10, ECR 2010 p. I-8489), Judgment of 20 June 2013, Riežniece (C-7/12).

<sup>17</sup> Judgment of 20 June 2013, Riežniece (C-7/12).

<sup>18</sup> *Idem*.

<sup>19</sup> *Idem*.

– a situation where a female worker who has been transferred to another post at the end of her parental leave following that assessment is dismissed due to the abolishment of that new post, where it was not impossible for the employer to allow her to return to her former post or where the work assigned to her was not equivalent or similar and consistent with her employment contract or employment relationship, *inter alia* because, at the time of the transfer, the employer was informed that the new post was due to be abolished, which it is for the national court to verify.

### **5. Termination of a fixed-term employment contract**

Dismissal of woman on the ground of pregnancy is contrary to European directives in the case of a contract for an indefinite period. The Court requested and interpretation of EU directives in the case of a fixed-term employment contract.

Such interpretation was asked, for example in *Tele Danmark A/S v Handels- og Kontorfunktionærernes Forbund i Danmark (HK)*.

In June 1995, Ms Brandt-Nielsen was recruited by Tele Danmark for a period of six months from 1 July 1995, to work in its customer service department for mobile telephones. It was agreed between the parties at the recruitment interview that Ms Brandt-Nielsen would have to follow a training course during the first two months of her contract. In August 1995, Ms Brandt-Nielsen informed Tele Danmark that she was pregnant and expected to give birth in early November. Shortly afterwards, on 23 August 1995, she was dismissed with effect from 30 September, on the ground that she had not informed Tele Danmark that she was pregnant when she was recruited.

Under the applicable collective agreement, Ms Brandt-Nielsen would have been entitled to pay maternity leave starting eight weeks before the expected date of giving birth. In the present case, that period should have started on 11 September 1995.

By its first question referring court asks whether the EU legislation must be interpreted as precluding a worker from being dismissed on the ground of pregnancy where she was recruited for a fixed period, she failed to inform the employer that she was pregnant even though she was aware of this when the contract of employment was concluded.

The Court noted that Directives 76/207 and 92/85 do not make any distinction, as regards the scope of the principle of equal treatment for men and women, according to the duration of the employment relationship in question. Had the Community legislature wished to exclude fixed-term contracts, which represent a substantial proportion of employment relationships, from the scope of those directives, it would have done so expressly. Consequently, those Directives are to be interpreted as precluding a worker from being dismissed on the ground of pregnancy if<sup>20</sup>:

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<sup>20</sup> Judgment of 4 October 2001, *Tele Danmark* (C-109/00, ECR 2001 p. I-6993).

- where she was recruited for a fixed period,
- she failed to inform the employer that she was pregnant even though she was aware of this when the contract of employment was concluded,
- and because of her pregnancy she was unable to work during a substantial part of the term of that contract.

In *Maria Luisa Jiménez Melgar v Ayuntamiento de Los Barrios* case<sup>21</sup> the employment contract is a fixed-term one.

In this case, Mrs Jiménez Melgar concluded several fixed-term part-time contracts with the Municipality. These contracts did not provide an expiry date, but it would terminate by either party notification. On 3 May 1999 Mrs Jiménez Melgar signed a fourth fixed-term part-time contract. Like the previous contracts, this contract did not specify any expiry date. However, on 12 May 1999, Mrs Jiménez Melgar was informed of the expiry of the contract on 2 June 1999.

In the meantime, the Municipality had been informed about Mrs Jiménez Melgar's state of pregnancy. Mrs Jiménez Melgar's employment contract came to an end on 2 June 1999. On 7 June 1999, a meeting took place with Mrs Jiménez Melgar in order to continue her employment relationship by the signature of a fifth fixed-term part-time contract. Mrs Jiménez Melgar refused to sign it.

In *Maria Luisa Jiménez Melgar v Ayuntamiento de Los Barrios* case the Court had to determine if Article 10 of Directive 92/85 prohibits the non-renewal by the employer of a pregnant worker's fixed-term employment contract.

The Court established that non-renewal of a fixed-term employment contract, when it comes to the end of its stipulated term, cannot be regarded as a dismissal; as such, non-renewal is not contrary to Article 10 of Directive 92/85.<sup>22</sup> The Court excluded from the scope of the concept of dismissal refusing to renew of a fixed-term contract. Non-renewal of a fixed-term contract could be viewed as a refusal of employment and if the non-renewal of a fixed-term contract is motivated by the worker's state of pregnancy, it constitutes direct discrimination on grounds of sex<sup>23</sup>.

## 6. Replacing a worker during maternity leave

According to the jurisprudence of the Court dismissal on grounds of pregnancy is direct discrimination regardless of the nature of the employment. In the case of *Webb against EMO Air Cargo* Court had to determine whether the termination of an employment contract on the grounds of pregnancy is direct discrimination in employment contracts concluded for an indefinite period.

In 1987 MO employed 16 persons. In June one of the four employees working in the import operations department, Mrs Stewart, found that she was

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<sup>21</sup> Judgment of 4 October 2001, *Jiménez Melgar* (C-438/99, ECR 2001 p. I-6915).

<sup>22</sup> *Idem*.

<sup>23</sup> *Idem*.



pregnant. EMO decided not to wait until her departure on maternity leave before engaging a replacement whom Mrs Stewart could train during the six months prior to her going on leave. Mrs Webb was recruited with a view, initially, to replacing Mrs Stewart following a probationary period. However, it was envisaged that Mrs Webb would continue to work for EMO following Mrs Stewart's return.

Mrs Webb started work at EMO on 1 July 1987 under a contract of employment concluded for an indefinite period. Two weeks later, she thought that she might be pregnant. Her employer was informed of this indirectly. He then called her in to see him and informed her of his intention to dismiss her. Mrs Webb's pregnancy was confirmed a week later.

In view of the harmful effects which the risk of dismissal may have on the physical and mental state of women who are pregnant, have recently given birth or are breastfeeding, including the particularly serious risk that pregnant women may be prompted voluntarily to terminate their pregnancy, the Community legislature subsequently provided for special protection to be given to women, by prohibiting dismissal during the period from the beginning of their pregnancy to the end of their maternity leave<sup>24</sup>. EU regulations provide that there is to be no exception to, or derogation from, the prohibition on the dismissal of pregnant women during that period, save in exceptional cases not connected with their condition<sup>25</sup>.

The Court argues that pregnancy is not in any way comparable with a pathological condition, and even less so with unavailability for work on non-medical grounds, both of which are situations that may justify the dismissal of a woman without discriminating on grounds of sex<sup>26</sup>. Moreover, in the Hertz judgment, the Court drew a clear distinction between pregnancy and illness, even where the illness is attributable to pregnancy but manifests itself after the maternity leave. As the Court pointed out (in paragraph 16), there is no reason to distinguish such an illness from any other illness<sup>27</sup>.

In circumstances such as those of Mrs Webb, termination of a contract for an indefinite period on grounds of the woman's pregnancy cannot be justified by the fact that she is prevented, on a purely temporary basis, from performing the work for which she has been engaged. The fact that the main proceedings concern a woman who was initially recruited to replace another employee during the latter's maternity leave but who was herself found to be pregnant shortly after her recruitment cannot affect justify termination of an employment contract. Accordingly, the EU legislation precludes dismissal of an employee who is recruited for an unlimited term with a view, initially, to replacing another employee during the latter's maternity leave and who cannot do so because, shortly after recruitment, she is herself found to be pregnant<sup>28</sup>.

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<sup>24</sup> Judgment of 14 July 1994, Webb / EMO Air Cargo (C-32/93, ECR 1994 p. I-3567).

<sup>25</sup> *Idem*.

<sup>26</sup> *Idem*.

<sup>27</sup> Judgment of 8 November 1990, Handels- og Kontorfunktionærernes Forbund / Dansk Arbejdsgiverforening (179/88, ECR 1990 p. I-3979).

<sup>28</sup> Judgment of 14 July 1994, Webb / EMO Air Cargo (C-32/93, ECR 1994 p. I-3567).

Prohibition for pregnant women to occupy a certain position cannot justify termination of a contract for an indefinite period because such prohibition is in effect for a limited period total duration of the contract<sup>29</sup>.

### 7. Illness

The Court of Justice has consistently recognized<sup>30</sup>, as regards the principle of equal treatment, that legitimacy to protect a woman's biological condition during and after pregnancy. In addition, he consistently held that any unfavourable treatment of women regarding pregnancy or maternity constitutes direct discrimination based on sex.

In the case of *Brown against Rentokil Ltd.* Court had to rule on the compatibility with EU law of dismissal due to illness arising from pregnancy.

In this case, Mrs Brown was employed by Rentokil as a driver. Her job was mainly to transport and change 'Sanitact' units in shops and other centres. In August 1990, Mrs Brown informed Rentokil that she was pregnant. Thereafter she had difficulties associated with the pregnancy. From 16 August 1990 onwards, she submitted a succession of four-week certificates mentioning various pregnancy-related disorders. She did not work again after mid-August 1990. Rentokil's contracts of employment included a clause stipulating that, if an employee was absent because of sickness for more than 26 weeks continuously, he or she would be dismissed. On 9 November 1990, Rentokil's representatives told Mrs Brown that half of the 26-week period had run and that her employment would end on 8 February 1991 if, following an independent medical examination, she had not returned to work by then. Mrs Brown did not go back to work following that letter. Mrs Brown was dismissed while pregnant.

Where a woman is absent owing to illness resulting from pregnancy or child birth, and that illness arose during pregnancy and persisted during and after maternity leave, her absence not only during maternity leave but also during the period extending from the start of her pregnancy to the start of her maternity leave cannot be taken into account for computation of the period justifying her dismissal under national law. As to her absence after maternity leave, this may be taken into account under the same conditions as a man's absence, of the same duration, through incapacity for work<sup>31</sup>. Therefore, European directives preclude dismissal of a female worker at any time during her pregnancy for absences due to incapacity for work caused by illness resulting from that pregnancy.

The Court held that the dismissal of a woman on account of pregnancy, confinement or repeated periods of absence due to an illness attributable to

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<sup>29</sup> Judgment of 5 May 1994, *Habermann-Beltermann / Arbeiterwohlfahrt* (C-421/92, ECR 1994 p. I-1657), Judgment of 3 February 2000, *Mahlburg* (C-207/98, ECR 2000 p. I-549).

<sup>30</sup> Judgment of 14 July 1994, *Webb / EMO Air Cargo* (C-32/93, ECR 1994 p. I-3567), Judgment of 8 November 1990, *Handels- og Kontorfunktionærernes Forbund / Dansk Arbejdsgiverforening* (179/88, ECR 1990 p. I-3979), Judgment of 30 June 1998, *Brown / Rentokil* (C-394/96, ECR 1998 p. I-4185) etc.

<sup>31</sup> Judgment of 14 July 1994, *Webb / EMO Air Cargo* (C-32/93, ECR 1994 p. I-3567).

pregnancy or confinement is - irrespective of the time when that illness occurs - contrary to the principle of equal treatment, since a male worker is not subject to such disorders and hence cannot be dismissed on that ground<sup>32</sup>. Although the Directive does not envisage the case of an illness attributable to pregnancy or confinement the Court recommends Member States to fix periods of maternity leave in such a way as to enable female workers to absent themselves during the period in which the disorders inherent in pregnancy and confinement occur<sup>33</sup>.

After this period is not important distinction between illness attributable to pregnancy or confinement and any other illness.

### 8. In vitro fertilisation

In Sabine Mayr/Bäckerei und Konditorei Gerhard Flöckner OHG (C-506/06) was asked for the first time whether the prohibition of dismissal of pregnant workers is applied also to a worker who is undergoing in vitro fertilisation treatment.

Mrs Mayr had been employed by Bäckerei und Konditorei Gerhard Flöckner OHG (hereafter 'Flöckner') from 3 January 2005 as a waitress.

In the context of an in vitro fertilisation attempt and after hormonal treatment lasting around a month and a half, follicular puncture was carried out on Mrs Mayr on 8 March 2005. The doctor treating Mrs Mayr prescribed sick-leave for Mrs Mayr lasting from 8 to 13 March 2005. On 10 March 2005, during telephone communication, Flöckner informed Mrs Mayr that she had been dismissed with effect from 26 March 2005. By a letter of the same day, Mrs Mayr informed Flöckner that, in the context of artificial fertilisation treatment, the transfer into her uterus of fertilised ovules was planned for 13 March 2005. On the date of the delivery of Mrs Mayr's dismissal, that is to say 10 March 2005, Mrs Mayr's collected ovules had already been fertilised by spermatozoa of her partner and, therefore, there already existed, on this same date, fertilised eggs in vitro. On 13 March 2005, being three days after Mrs Mayr had been informed of her dismissal, two fertilised eggs were transferred into Mrs Mayr's uterus.

By its question, the referring court is asking, in essence, whether the prohibition of dismissal of pregnant workers must be interpreted as extending to a worker who is undergoing in vitro fertilisation treatment where, on the date she is given notice of her dismissal, her ova have already been fertilised by her partner's sperm cells, so that in vitro fertilised ova exist, but those ova have not yet been transferred into her uterus.

The EU legislation confers protection against dismissal throughout the period of the pregnancy. In Mayr case the question raised is when a pregnancy begins, so the moment from when the woman is protected against dismissal on grounds of pregnancy.

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<sup>32</sup> Judgment of 8 November 1990, Handels- og Kontorfunktionærernes Forbund / Dansk Arbejdsgiverforening (179/88, ECR 1990 p. I-3979).

<sup>33</sup> *Idem*.

Advocate General claims that employee who undergoes an in vitro fertilisation procedure is not a ‘pregnant worker’ for the purposes of the first part of Article 2(a) of Directive 92/85/EEC, if, at the time when she was given notice of termination of employment, her ova had been fertilised in a laboratory but had not yet been transferred to her body<sup>34</sup>. This has been adopted by the Court<sup>35</sup>.

Having regard to the foregoing, the reply to the question referred must be that Directive 92/85, and, in particular, the prohibition of dismissal of pregnant workers provided for in Article 10(1) of that directive, must be interpreted as not extending to a female worker who is undergoing in vitro fertilisation treatment where, on the date she is given notice of her dismissal, her ova have already been fertilised by her partner’s sperm cells, so that in vitro fertilised ova exist, but they have not yet been transferred into her uterus.

The Court states that it cannot be accepted, for reasons connected with the principle of legal certainty, that the protection may be extended to a worker when, on the date she was given notice of her dismissal, the in vitro fertilised ova had not yet been transferred into her uterus<sup>36</sup>. This approach is based on the fact that the transfer of fertilized ova into the uterus may be delayed for any reason, for many years or even dismisses such a transfer.

Although the Court held that Directive 92/85 provides protection in such cases it is necessary to consider whether dismissal of Mrs Mayr is not contrary to the principle of equal treatment between men and women. The Court noted that male and female workers are equally exposed to illness, if a female worker is dismissed on account of absence due to illness in the same circumstances as a man then there is no direct discrimination on grounds of sex<sup>37</sup>. Nevertheless, the treatment in question in the main proceedings – namely a follicular puncture and the transfer to the woman’s uterus of the ova removed by way of that follicular puncture immediately after their fertilisation – directly affects only women. It follows that the dismissal of a female worker essentially because she is undergoing that important stage of in vitro fertilisation treatment constitutes direct discrimination on grounds of sex.

The Court concluded that the European provisions preclude the dismissal of a female worker who is at an advanced stage of in vitro fertilisation treatment inasmuch as it is established that the dismissal is essentially based on the fact that the woman has undergone such treatment<sup>38</sup>.

## 9. Conclusions

One of EU objectives is to ensure equal opportunities and equal treatment for men and women and to combat any form of discrimination on the grounds of

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<sup>34</sup> Opinion of Advocate General Dámaso Ruiz-Jarabo Colomer delivered on 27 November 2007.

<sup>35</sup> Judgment of 26 February 2008, *Mayr* (C-506/06, ECR 2008 p. I-1017).

<sup>36</sup> *Idem*.

<sup>37</sup> Judgment of 8 November 1990, *Handels- og Kontorfunktionærernes Forbund / Dansk Arbejdsgiverforening* (179/88, ECR 1990 p. I-3979).

<sup>38</sup> Judgment of 26 February 2008, *Mayr* (C-506/06, ECR 2008 p. I-1017).

gender. According to Article 5(1) of Directive 76/207, application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, meant that men and women were to be guaranteed the same conditions without discrimination on grounds of sex.

In European Court of Justice case-law was considered discriminatory treatment on the grounds of sex and, accordingly, unlawful discrimination contrary to EU law a dismissal on account of pregnancy, confinement or repeated periods of absence due to an illness attributable to pregnancy or confinement, or taking parental leave. Dismissal of woman on the ground of pregnancy is contrary to European directives in the case of a contract for a definite or an indefinite period but non-renewal of a fixed-term employment contract, when it comes to the end of its stipulated term, cannot be regarded as a dismissal under EU law. It is also unlawful dismissal a dismissal of a woman solely because she has attained the qualifying age for a state pension, which age is different under national legislation for men and for women. The Court also concluded that the European provisions preclude the dismissal of a female worker who is at an advanced stage of in vitro fertilisation treatment inasmuch as it is established that the dismissal is essentially based on the fact that the woman has undergone such treatment.

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